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January 26, 2011

Mr. Austin Schlick  
FCC/OGC

***Ex parte* Letter GC Docket No. 10-43**

Dear Mr. Schlick,

Since it has been a long time since the comments in this rulemaking were submitted, I wanted to refresh the record with recent material.

The NPRM states in para. 6

Oral presentations, however, must be adequately documented for the Commission to rely on them in its decisionmaking and for other parties to respond to them. When for any reason the record does not adequately reflect the contents of oral *ex parte* presentations, the public is deprived of a fair opportunity to respond to oral communications with decisionmakers, and the Commission may lack an adequate administrative record to the extent that the Commission wishes to rely on information presented during an oral *ex parte* presentation. (Footnotes omitted)

Where does compliance stand today? Here are two recent *ex parte* notices filed by prominent practitioners who are both former FCC bureau/office chiefs:

<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021024362>

<http://fjallfoss.fcc.gov/ecfs/document/view?id=7020918453>

While §1.1206(b)(2) requires “More than a one or two sentence description of the views and arguments presented is generally required”, neither of these filings have *any* information on what was said. While these 2 cases may not be the most grievous cases in recent memory, they certainly show the low level that compliance has fallen to under the current rules and enforcement posture of the Commission in this area.

While the NPRM states the number of complaints received is “generally not more than one or two a year”, this probably reflects a “gentleman’s understanding” among practitioners not to raise such issues rather than actual compliance. I repeat what I have said several before, I am not aware of a single case in which FCC has formally taken *any* enforcement action dealing with an *ex parte* violation during the 30+ years such rules have been in existence! This seems at odds with the statement in the NPRM that “(t)he Commission remains committed to enforcing its rules.” (para. 11)

A second issue I would like to raise is what I have called the “NTIA *ex parte* loophole”. I have raised this issue in p. 5-6 of my comments in Docket 10-43 and also in my blog, <http://spectrumtalk.blogspot.com/2006/06/transparency-at-fcc-ntia-ex-parte.html>

Private parties have found it very convenient to abuse the provision for delayed comment filing of §1.1204(a)(5) by funneling some of their concerns about a pending matter through NTIA. The LightSquared ATC application, SAT-MOD-20101118-00239, Call Sign: S2358, ET Docket No. 10-142, has a high potential for such abuse which was a frequent occurrence during the ultrawideband (UWB) rulemaking, ET Docket 98-153, that raised some related technical issues.

The recent NTIA letter to the Commission on this application, [http://www.ntia.doc.gov/filings/2011/NTIA\\_FCCletter\\_01122011.pdf](http://www.ntia.doc.gov/filings/2011/NTIA_FCCletter_01122011.pdf), confirms in fn. 11 that the GPS industry has been lobbying NTIA on this issue. It is a reasonable expectation that this lobbying will continue with the intent of influencing FCC through NTIA. While such contact is perfectly proper, NTIA communicating such industry viewpoints to FCC off the public record vitiates the Commission’s commitment to transparency and puts the proponents of the application at a serious disadvantage. During his tenure at NTIA, former Administrator Gallagher admitted at a public meeting that such communications from private entities to NTIA to FCC were occurring. There is no reason to believe this has stopped.

I urge the Commission to have an urgent discussion with NTIA on this issue and ask NTIA to report voluntarily to the docket for this application *all* industry contact, except from government contractors specifically contracted for analysis in this area, that is intended to influence FCC’s decision in this proceeding. At the very least, NTIA should agree to timely filings of all points they convey to FCC that derive from such industry contact and not rely on their option for delayed filing permitted under §1.1204(a)(5).

Sincerely,



Michael J. Marcus, Sc.D., F-IEEE  
Director

cc: Docket 10-43  
Joel Kaufman